



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2003 Assembly Bill 67	Senate Amendments 1 and 2 to Assembly Substitute Amendment 1
<i>Memo published: February 3, 2004</i>	<i>Contact: Laura Rose, Deputy Director (266-9791)</i>

ASSEMBLY BILL 67

Assembly Bill 67, as amended by Assembly Substitute Amendment 1, provides certain employment-related and other protections for health care providers and other individuals who refuse to participate in certain medical procedures. Hereafter, references to the “bill” mean the bill as amended by Assembly Substitute Amendment 1 and passed by the Assembly.

Separate Cause of Action

Assembly Bill 67 creates a clear cause of action under the Wisconsin Fair Employment Act (WFEA) for employees and prospective employees discriminated against for their refusal to participate in certain activities. It also creates a separate cause of action. Under the bill’s separate cause of action, a person who is adversely affected by, or who reasonably may be expected to be adversely affected by, conduct that violates certain provisions of the bill (e.g., adverse employment action based on a refusal to participate in certain activities) may bring a civil action for injunctive relief, including reinstatement, or damages, including damages for emotional or psychological distress, or both. Generally, such actions must be commenced within six years after the cause of action accrues.

This separate cause of action does not apply to claims that are subject to the WFEA. Under the bill, a successful claimant may obtain equitable relief, including reinstatement, or damages, or both. Under the bill, damages *does not* include “noneconomic damages” as described in current law.¹ Finally,

¹ Current law defines “noneconomic damages” to mean “moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.” [s. 893.55 (4) (a), Stats.]

the bill requires that the separate cause of action be commenced within one year after the cause of action accrues.

Employment Discrimination Based on Creed

The bill amends the WFEA to provide that employment discrimination based on creed also specifically includes discriminating against any employee or prospective employee in a manner prohibited by the WFEA on the basis of that person's refusal, or statement of an intention to refuse, based on his or her creed, to participate in any of the following:

1. A sterilization procedure.
2. An abortion.²
3. An experiment or medical procedure that destroys an in vitro human embryo or uses cells or tissue derived from the destruction of an in vitro human embryo.
4. An experiment or medical procedure on an in vitro human embryo that is not related to the beneficial treatment of the in vitro human embryo.
5. An experiment or medical procedure on a developing child in a natural or artificial womb, at any stage of development, that is not related to the beneficial treatment of the developing child.
6. A procedure, including a transplant procedure, that uses fetal tissue or organs other than fetal tissue or organs from a stillbirth, spontaneous abortion, or miscarriage.
7. The withholding or withdrawal of nutrition or hydration, if the withholding or withdrawal would result in the patient's death from malnutrition or dehydration, or complications of malnutrition or dehydration, rather than from the underlying terminal illness or injury, unless the administration of nutrition or hydration is medically contraindicated.
8. An act that intentionally causes or assists in causing the death of an individual, such as by assisted suicide, euthanasia, or mercy killing.

Under the bill, to "participate in" means to perform; to practice; to engage in; to assist in; to recommend; to counsel in favor of; to make referrals for; to prescribe, dispense, or administer drugs or devices, other than contraceptive articles, as defined in s. 450.155 (1) (a), Stats.,³ for; or to otherwise promote, encourage, or aid.

² For purposes of Assembly Bill 67 and ASA 1, an "abortion" means "the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she may be pregnant and with intent other than to increase the probability of a live birth, to preserve the life or health of the infant after live birth or to remove a dead fetus." [See s. 253.10 (2) (a), Stats.]

³ Section 450.155 (1) (a), Stats., defines contraceptive articles as "any drug, medicine, mixture, preparation, instrument, article or device of any nature used or intended or represented to be used to prevent a pregnancy."

The bill expands the provisions of current law relating to the refusal of hospitals, health care professionals, and hospital employees to participate in various procedures to apply to a refusal, based on moral or religious grounds, to participate in any of the eight activities described above. In addition, the bill allows a person who may not file a claim under the WFEA and who is adversely affected by conduct that violates these provisions to bring a civil action for equitable relief, including reinstatement, or for damages, or both, and attorney's fees. For purposes of this provision of the bill, damages do not include "noneconomic damages" as defined under current law.⁴ Such an action must be commenced within one year after the cause of action accrues.

The bill also provides that licensed pharmacists are exempt from liability for damages that result from a refusal to participate in any of the eight activities if the refusal is based on religious or moral precepts. In addition, the bill changes the exemptions from liability under current law for physicians and other health care professionals licensed or certified by the Medical Examining Board and registered and licensed practical nurses licensed by the Board of Nursing so that they are consistent with the exemption under the bill for pharmacists.

Further, the bill specifies that the Medical Examining Board, Board of Nursing, Pharmacy Examining Board, and the Department of Regulation and Licensing may not take any disciplinary action against any of the following who, in writing, refuse or state an intention to refuse to participate in any of the eight activities if the refusal is based on moral or religious grounds: (1) a physician or other health care professional licensed or certified by the Medical Examining Board; (2) a registered or practical nurse licensed by the Board of Nursing; or (3) a pharmacist licensed by the Pharmacy Examining Board.

Under the bill, the Medical Examining Board may not take disciplinary action against a physician who makes such a refusal even if the physician refuses to transfer a patient who has executed a declaration authorizing the withholding or withdrawal of life-sustaining procedures or feeding tubes, or who has a declaration authorizing the withholding or withdrawal of life-sustaining procedures or feeding tubes, or who has executed a power of attorney for health care instrument consenting to the withholding or withdrawal of feeding tubes, to another physician who will comply with the declaration or instrument. However, under the bill, the Medical Examining Board may take disciplinary action against a physician who makes such a refusal if the physician refuses to transfer an incapacitated, terminally ill patient who has executed such a declaration.

Finally, under the bill, a physician who receives a power of attorney for health care instrument or who is notified that a patient has executed a declaration must immediately review the instrument or declaration and, if the physician intends to refuse to participate in any of the eight activities, must as soon as possible inform the patient orally and in writing about the refusal and any concerns that the physician has about the instrument or declaration. Similar requirements apply if a physician received a statement of incapacity regarding a patient who has executed a power of attorney for health care instrument. In such cases, the physician must immediately review the statement and, if the physician intends to refuse to participate in any of the eight activities, must, as soon as possible, inform the

⁴ Current law defines "noneconomic damages" as "moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection."

patient's principal, orally and in writing, about the refusal and about any concerns regarding the statement.

SENATE AMENDMENT 1

Senate Amendment 1 does the following:

1. The bill, as passed by the Assembly, amends a provision in current chs. 154 and 155 to add language that an attending physician who is notified about a declaration (under ch. 154) or a power of attorney for health care instrument or statement of an agent (under ch. 155) must immediately review the declaration, instrument, or statement. If the physician intends to invoke his or her rights under the bill relating to conscience protections, the physician must, as soon as possible, inform the declarant (under ch. 154) or principal (under ch. 155) both orally and in writing of that intent and of the physician's concerns, if any, about the declaration.

Under the amendment, instead of amending current law, a new provision in chs. 154 and 155 is created. That new provision contains essentially the same requirements as the provision under the bill--that there must be an oral and written notification that the physician will be invoking his or her conscience rights with respect to the declaration on instrument. However, the amendment makes technical changes to the provision to more accurately reflect the terminology in chs. 154 and 155.

2. Under current law, in both chs. 154 and 155, no health care facility or health care provider may be held civilly or criminally liable or charged with unprofessional conduct for failing to comply with a declaration or a power of attorney for health care instrument or the decision of a health care agent, except that failure of a physician to comply constitutes unprofessional conduct if the physician refuses or fails to make a good faith attempt to transfer the principal to another physician who will comply. The bill provides that a physician may not be disciplined by the Medical Examining Board (MEB) or the Department of Regulation and Licensing (DRL) for refusing, or stating an intention to refuse to participate in one of the eight activities specified in the bill, including refusing or stating an intention to refuse to transfer a patient to another physician who will comply with a living will or an instrument of power of attorney for health care. The only situation in the bill in which a physician would be required to make a good faith attempt to transfer a patient to another physician who will comply with the declaration or the power of attorney for health care would be if the patient had incapacity **and** a terminal condition.

Under the amendment, as under the bill, a physician who refuses, or states an intention to refuse, on moral or religious grounds to participate in one of the eight activities specified in the bill may not be required to participate in the activity and may not be disciplined by the MEB or the DRL for refusing or stating an intention to refuse to participate in the activity.

However, if the declaration, instrument for power of attorney for health care, or directive from a health care agent directs the physician to participate in activity number 7 (withholding or withdrawal of nutrition or hydration from a non-terminal patient), and the physician intends to invoke his or her right to not participate in the activity, the physician must still comply with current law and make a good faith attempt to transfer the patient to another physician who will comply with the declaration, power of

attorney for health care, or health care agent's directive. Under the amendment, however, a physician is not required to locate another physician who is willing to participate in activities 1 to 6 or 8, if an advance directive directs that any of those other activities be performed on the patient. Further, if there is no advance directive on behalf of a patient, a physician is not required to locate another physician who is willing to participate in activities 1 to 8. Therefore, for example, if a patient not in a terminal condition, or someone on that patient's behalf, requests a physician to withhold or withdraw nutrition or hydration from that patient, and the withholding or withdrawal would result in the patient's death from malnutrition or dehydration, the physician would not be required, in that situation, to locate another physician who would be willing to participate in the withholding or withdrawal of nutrition and hydration.

SENATE AMENDMENT 2

Senate Amendment 2 does the following:

1. The amendment modifies activity number 5 in the bill (an experiment or medical procedure on a developing child in **a natural or artificial womb**, at any stage of development that is not related to the beneficial treatment of the developing child) to encompass only an experiment or medical procedure on a developing child in **an artificial womb**.
2. The amendment modifies activity number 7 (the withholding or withdrawal of nutrition or hydration if the withholding or withdrawal would result in the patient's death from malnutrition or dehydration, or complications of malnutrition or dehydration, rather from the **underlying terminal** illness or injury, unless the administration of nutrition or hydration is medically contraindicated) so that the protections under the bill are only extended for the withholding of nutrition and hydration from a patient **who is not in a terminal condition**, if the withholding or withdrawal of nutrition or hydration would result in the patient's death from malnutrition or dehydration, or complications of malnutrition or dehydration, rather than from the underlying illness or injury, unless the administration of nutrition or hydration is medically contraindicated.
3. The amendment modifies activity number 8 (an act that intentionally causes or assists in causing the death of an individual, **such as by** assisted suicide, euthanasia, or mercy killing) to encompass **only** to assisted suicide, euthanasia, or mercy killing.

Legislative History

On May 29, 2003, the Assembly adopted ASA 1 on a vote of Ayes, 63, Noes, 30, and Paired, 2. On June 4, 2003, the Assembly passed Assembly Bill 67, as amended, on a vote of Ayes, 56, Noes, 35, and Paired, 6. On January 30, 2004, the Senate Committee on Health, Children, Families, Aging and Long-Term Care recommended introduction and adoption of Senate Amendments 1 and 2 by a vote of Ayes, 8; Noes, 1; and recommended concurrence in the bill, as amended by Senate Amendments 1 and 2, by a vote of Ayes, 5; Noes, 4.

LR:RJC:all;jal;jal;rv;ksm